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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re H.O., a Person Coming Under the
Juvenile Court Law.

B218104

(Los Angeles County
Super. Ct. No. CK66409)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANGELINA O.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Jacqueline Lewis, Court Commissioner. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Melinda S. White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Angelina O. (Mother) is the mother of H.O. (H., born June 2005). In October 2006, the Department of Children and Family Services (the Department) received a referral after reports that H. had been in the care of her maternal grandmother, Rosalinda M. (Rosalinda)¹ since birth, and that Mother was engaging in criminal activity and using drugs. Shortly thereafter, Mother tested positive for cocaine, and she agreed to enter a drug treatment program and to voluntarily place H. with her maternal great-grandmother, Kathy R. (Kathy). On December 27, 2006, the Department filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (g).² H. was placed with Kathy. Kathy lived in a house on the same lot with two other houses; one was occupied by Rosalinda, and the other was occupied by the maternal great-great-grandmother, Erlinda D. Mother would not disclose the whereabouts of H.'s father, Anthony C. (Father).

On May 18, 2007, Mother pled no contest to the petition. The court sustained the allegations as to section 300, subdivision (b) due to her cocaine use, but dismissed the subdivision (g) allegations. H. remained at Kathy's home. Mother received reunification services and monitored visits. In June 2007, she enrolled in a residential substance abuse treatment program. The court ordered unmonitored day visits with H. and granted the Department discretion to allow overnight visits.

In October 2007, Mother had another child, Samuel, and the court placed him with Kathy. Mother was living with Rosalinda and was allowed to visit Samuel but was ordered not to reside with Kathy.³

On November 8, 2007, the Department filed a section 388 petition to change Mother's visits from unmonitored to monitored because she was discharged from her

¹ As the principals in this case are related, for the sake of clarity we refer to them by their first name, with no disrespect intended.

² All further statutory references are to the Welfare and Institutions Code.

³ Samuel, who is not a party to this appeal, did not have the same father as H.

drug treatment program and had refused to enter a residential treatment program. That petition was sustained on December 4, 2007.

On January 28, 2008, a section 366.21, subdivision (f) hearing was held. The social worker reported that during a recent visit, H. appeared well-groomed and healthy. However, she ignored instructions from Mother, Kathy, and the social worker. Mother had not completed drug treatment counseling and parenting programs. She had completed most of her drug tests on demand, missing only one. The court ordered that monitored visits and reunification services continue.

In May 2008, the Department reported that Mother had been arrested in February for a hit and run car accident. Charges for that accident were dropped, but Mother was jailed overnight due to an outstanding warrant. The Department recommended that reunification services with H. be terminated. The court set a section 366.22 18-month permanency review hearing for June 4, 2008.

In June 2008, the Department reported that Mother was not in compliance with her drug treatment program. At a hearing on June 4, 2008, the court terminated Mother's reunification services with H. and set a section 366.26 hearing for October 1, 2008.

On October 1, 2008, Mother filed a section 388 petition requesting that H. be returned to her, or alternatively that she be allowed unmonitored weekend and overnight visits.

On January 28, 2009, the court granted Mother's section 388 petition in part and granted unmonitored visitation with discretion to the Department to liberalize visits after consultation with H.'s attorney. It continued the section 366.26 hearing until April 13, 2009.

After Mother missed 10 drug tests between January and May 2009, the Department, which had recommended that the children be returned to Mother, requested that the court order adoption as the permanent plan. Mother had three negative drug tests in June and July 2009 but tested positive for alcohol at one of those tests.

At the contested section 366.26 hearing which commenced on July 17, 2009, Mother testified on her own behalf. She said she took care of H. every day and spent her

time at home with the children, except when she was in school or working at her part-time job. Mother claimed that she went out with friends once a month. H. called her “Mommy.” Although the social worker told Mother that Kathy wanted her off the property, Mother claimed that Kathy denied having that intent. Mother said that Kathy had falsely accused her of smoking methamphetamine because she wanted to continue getting government assistance for H.’s care.

The hearing was continued until July 31, 2009, for testimony from Rosalinda and Kathy. In the meantime, Mother missed a drug test on July 21. On July 29, Mother filed a second section 388 petition, requesting a return of H. to her custody.

On July 31, 2009, Kathy testified that Mother was no longer living on the property. Mother would visit regularly with the children only whenever there was an impending court hearing. Mother did not perform any caretaking responsibilities, such as feeding or bathing the children or taking them to school. Kathy said she took H. to the doctor, claiming that Mother had taken the child on one occasion. Mother often got impatient with the children and had to be reminded to not use curse words in their presence. Kathy stated that she wished to adopt H. and that she would allow Mother to visit. On cross-examination, she admitted that her relationship with Mother was not very good.

The hearing was continued until August 4, 2009. Mother’s sister, Salina, stated that she had concerns about Mother’s interactions with H. She testified that on Easter Sunday of 2009, she went to see Mother in her bedroom. Mother was sleeping and there was a crystal “meth pipe” and a lighter in the bed next to her. Salina woke Mother up and asked her about the pipe, but Mother denied that the pipe was hers. Salina told Rosalinda and Kathy about her discovery.

Rosalinda testified that she had asked Mother to leave her home about two or three weeks before the hearing because Mother did not want to get a job. Rosalinda said that Mother’s relationship with H. was “more of a friend” and that “[H.] runs wild with her. It’s more of a friendship.” Rosalinda thought adoption was the best plan because Mother

was not stable and could not control H. Rosalinda believed that Mother was still getting “high” on drugs because she would come home and sleep for two or three days.

H.’s attorney and the Department requested that the court terminate parental rights. Mother’s attorney requested that the case be continued so it could be on the “same track” as Samuel’s case.

The court dismissed Mother’s second 388 petition as untimely, terminated Mother’s and Father’s parental rights, found that it was likely H. would be adopted, and designated Kathy as the prospective adoptive parent.

Mother filed a timely notice of appeal of the “[t]ermination of parental rights and return of minor child to me, on 8/4/09.” Mother does not appeal any of the orders regarding Samuel.

DISCUSSION

I. Termination of Parental Rights

Mother contends on appeal that the court erred in terminating her parental rights. She argues she has a bond with H. and has been in constant contact with her. She denies that she is presently using drugs and claims Kathy fabricated evidence to the contrary so she could continue to receive government assistance for caring for H.

Pursuant to section 366.26, subdivision (c)(1), once the juvenile court determines a child is adoptable, the court shall terminate parental rights and order the child placed for adoption unless the court finds a compelling reason for determining that termination would be detrimental to the child due to certain circumstances. One such circumstance is where “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) Mother asserts this exception applies here.

It is the parent’s burden to show that termination would be detrimental. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) “To meet the burden of proof for the section 366.26, subdivision (c)(1)[(B)(i)] exception, the parent must show more than frequent

and loving contact or pleasant visits. [Citation.] . . . The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953-954.)

To justify application of section 366.26, subdivision (c)(1)(B)(i), any relationship between the parent and child must be sufficiently significant that the child would suffer detriment from its termination. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) The juvenile court must consider many variables, including the child's age, the length of time the child was in parental custody and in foster care, and the effect of interaction between parent and child and the child's particular needs. (*Id.* at p. 467; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 810-811.) The court must then balance the strength and quality of the parent-child relationship against the security and sense of belonging that a stable family would confer on a child. (*In re Zachary G., supra*, at p. 811.) "If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 250.) The appellant has the burden of showing that the order is not supported by substantial evidence. (*Id.* at p. 251.)

Mother argues she is not required to show that H. has a primary attachment to her or that she has day-to-day contact with the child to come within the contact and benefit exception. She claims she has made progress with respect to addressing her drug problem and relies on the fact that as late as January 2009, the plan was to return H. to her custody.

The court stated in terminating Mother's parental rights: "[H.] has been in the system for almost three years, since she was about six months old. And the Mother's sobriety has been a rollercoaster here. She has not been able to provide for any length of time any kind of clean lifestyle or stability for the minor [H.] And . . . there have been times when the court went to unmonitored visits. The court in an abundance of caution granted a 388 and allowed Mother to have overnight visits. . . . I think that [H.] does have a relationship with her Mother and I'm sure that she loves her Mother. But the

reality is that is not the stability for her, that is not who does the day-to-day care, because Mother's sobriety has been so inconsistent. And at this point the court is really looking at, when we're two and a half years into a case, what is in [H.'s] best interest. This is a little girl — and it is very clear to me that what is in her best interest is having stability and stability. . . . It's not in [H.'s] best interest today because Mother's clean, and in two weeks from now it's not in [H.'s] best interest because Mother is dirty and back and forth and back and forth. What this court is concentrating on here is, first of all the benefit that permanence for this child far outweighs the benefit of the relationship that she has with her mom. . . . The Mother has had frequent contact. I'm sure that contact is loving when Mother is not under the influence, but that's not enough. And the court does have to look at this point to the benefit of [H.] to stability and permanence.”

We agree with the trial court's assessment. While Mother established that she and H. maintained contact and enjoyed their visits, she failed to show that H. would benefit from a continuation of the parent-child relationship. Despite three years of Department jurisdiction, Mother had not shown the ability to provide H. with a safe and stable home. She was having difficulty securing a home for herself, as shown by her eviction from the property due to her refusal to do anything constructive with her life. Moreover, other relatives, in particular Kathy, provided the day-to-day care for the child. Mother's characterization of Kathy as a liar who stood to gain financially from continuing to provide care for H. is unsupported by the evidence. She ignores the fact that other family members agreed with Kathy's assessment that Mother was not providing care for H. Rosalinda testified Mother and H.'s relationship was like that of friends, not parent and child. Salina feared Mother's drug use was having a negative impact on her ability to assume a parental role for H.

Nor do we accept Mother's claim that she had shown sufficient progress in dealing with her drug problem. The testimony showed she was in denial about her drug use. She continued to miss drug tests. In fact, she missed one while the section 366.26 hearing was proceeding. Salina found a methamphetamine pipe in Mother's bed, and Rosalinda

believed Mother was still getting “high” due to Mother’s proclivity for staying out late and returning to sleep for days at a time.

Substantial evidence supports the trial court’s conclusion that due to Mother’s drug abuse and absences from the home, any bond she had with H. was overshadowed by the benefit H. would derive from a stable environment. We conclude the court properly terminated Mother’s parental rights.

II. Denial of Section 388 Petition

Mother filed her second section 388 petition on July 29, 2009, in the midst of the section 366.26 hearing. She sought return of H. to her custody. She claimed in her petition that she had “almost daily contact” with H., had been handling most parental functions, had continued to drug test, and had completed all programs.

On August 4, 2009, after the court heard testimony from all the main parties in the action, it stated, “Let me start by saying the court did deny the 388 because it was filed literally in the middle of the contested .26. We had begun the contested .26 and heard testimony and we put it over for another date. The 388 was filed, and the court does not believe it was timely. That being said, and given the posture of this case the court let in a lot of evidence that Mother would have already put in on the 388, as well as other counsel, in regards to whether or not she’s clean, and whether there were any changes. Or otherwise I would have kept it out completely as non-relevant in a normal 366.26 hearing.”

Section 388 provides that any parent may file a petition to change, modify, or set aside any order of court previously made or to terminate jurisdiction of the court upon grounds of change of circumstance or new evidence. “The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child’s best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) “In order to avoid summary denial, the petitioner must make a ‘prima facie’ showing of ‘facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ [Citations.] ‘[I]f the petition fails to state a change of

circumstances or new evidence that might require a change of order, the court may deny the application ex parte. [Citation.]’ [Citation.] On the other hand, ‘if the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.’ [Citation.]” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912, fn. omitted.) We review the denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

The Department argues the petition was untimely because in 2009, California Rules of Court, rule 5.570 provided that if it appears to a court that a petition for modification pursuant to section 388 will be contested or if the court desires to receive further evidence on the issue, the court must order that a hearing on the petition for modification be held within 30 calendar days after the petition is filed. (Rule 5.570(f).)⁴ It argues that due to the timing of Mother’s petition, “there was no practical opportunity for the court to grant a hearing on the section 388 petition within 30 days.” We are not persuaded. A section 388 petition may be filed and heard at any time, up to and including the time of the section 366.26 hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) The rule cited by the Department does not purport to affect when a section 388 may be filed. Instead, it sets a deadline for the court to conduct a hearing.

Nevertheless, we find no basis for disturbing the court’s ruling. In essence, the court held a concurrent hearing with respect to Mother’s 388 petition and the selection of a permanent plan. The court heard testimony from all the interested parties about Mother’s relationship with H. Mother was allowed to testify about her current situation and her relationship with her daughter. Mother, therefore, was given a chance to present evidence in support of her request to have H. returned to her. Indeed, she does not suggest there was further evidence for the court to consider. Mother did not establish that H. should be returned to her, whether the hearing was held pursuant to section 388 or section 366.26. She did not show there was a change of circumstances or that it was in H.’s best interests to change the arrangements which had been in place since her birth.

⁴ Rule 5.570 was amended effective January 1, 2010.

(*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) The court's denial of Mother's section 388 petition did not constitute an abuse of discretion.

DISPOSITION

The orders are affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.